

FILED: September 27, 2021

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 17-3  
(2:15-cr-00472-RMG-1)

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UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DYLANN STORM ROOF

Defendant - Appellant

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AUTISTIC SELF ADVOCACY NETWORK; AUTISTIC WOMEN &  
NONBINARY NETWORK

Amici Supporting Appellee

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O R D E R

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The judges of the Fourth Circuit having recused themselves in this case, Chief Justice Roberts designated and assigned Eighth Circuit Judge Duane Benton, Third Circuit Judge Kent A. Jordan, and Sixth Circuit Senior Judge Ronald Lee Gilman to perform judicial duties in this case.

Following briefing and oral argument, the designated panel issued a 149-page

published decision affirming appellant's conviction and sentence. Appellant filed a timely petition for rehearing and rehearing en banc and a request for designation of an en banc court pursuant to 28 U.S.C. § 291(a) or § 292(a) or (d). Judge Benton, Judge Jordan, and Senior Judge Gilman have denied appellant's petition for panel rehearing.

The court declines to take the unprecedented step of using 28 U.S.C. § 291 or 292 to seek a substitute en banc court for the purpose of considering appellant's petition for rehearing en banc. "[U]nder the wording of 28 U.S.C. § 46(c) and the Supreme Court's holding in *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 94 S.Ct. 2513, 41 L.Ed.2d 358 (1974), only judges of the Circuit who are in regular active service may make the determination to rehear a case en banc." *United States v. Nixon*, 827 F.2d 1019, 1021 (5th Cir. 1987). Designation of a visiting judge for this purpose is "an inappropriate procedure, unrelated to providing a quorum for the en banc court of a circuit." *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1054 (5th Cir. 2010).

Accordingly, the motion for designation of an en banc court is denied, and the petition for en banc rehearing is denied due to the lack of a quorum for en banc review.

Entered at the direction of Chief Judge Gregory.

For the Court

/s/ Patricia S. Connor, Clerk